

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL DIVISION, MILIMANI

Civil Case 387 of 2003 (OS)

IN THE MATTER OF THE REGISTRATION OF BUSINESS NAMES CAP 499

LAWS OF KENYA

AND

IN THE MATTER OF KIOSK AFRICA

BETWEEN

TOM MBOYA OPIYO.....PLAINTIFF

AND

AUNDRAE EUGENE CASSELL.....DEFENDANT

R U L I N G

On 9th December, 2004 this suit was set down for hearing on 7th June, 2005. The date was taken *ex parte* by the Plaintiff's advocates. The Defendant's advocates, upon being served with hearing notice, wrote to the Plaintiff's advocates a letter dated 28th February, 2005. In it they stated that the Defendant would be out of the country from 25th May, 2005 to the 26th of January, 2006 and would therefore not be in a position to attend the hearing scheduled for 7th June, 2005. They thus gave notice that they shall seek adjournment of the hearing on 7th June, 2005. As an alternative and subject to court's convenience they suggested that hearing of the case be brought forward to 13th May, 2005 or earlier. It would appear that the Plaintiff's advocates never responded to this letter. Instead the Plaintiff applied by chamber summons dated 20th April, 2005 for an order that the Defendant do furnish security "for his appearance in this matter in the sum of Kshs. 5 million." The application is stated to be brought under Order 38, rules 1 and 2 of the Civil Procedure Rules (the Rules). Rule 1 aforesaid provides for situations where a defendant may be called upon to furnish security for his appearance. Rule 2 provides when such defendant may be compelled to furnish security for his appearance.

The grounds for the application stated on the face thereof are that the Defendant intends to leave the jurisdiction of the court; that the Plaintiff stands to suffer "considerable loss and damage" if the orders sought are not granted; and that it is in the interest of justice that the orders sought be granted. The supporting affidavit sworn by the Plaintiff exhibits the Defendant's advocates' letter dated 28th February, 2005 already referred to and holds it forth as the basis for the belief that the Plaintiff intends to abscond from the jurisdiction of the court.

The Defendant has opposed the application. In a replying affidavit sworn and filed on 6th May, 2005 he has pointed out that though he is an American citizen he has lived and worked in this country as a Christian missionary since 1991; that indeed he intends to travel to the United States of America for his annual but working leave from 25th May, 2005 to 26th January, 2006; that he would come back to the country, and it is not true that he intends to abscond; that he has not been to his home country for a long time and it is necessary that he visits with his family, especially as he was unable to travel home for his mother's funeral when she died in December 2002; that he also needs to visit the headquarters of his ministry in the United States in order to meet their sponsors and report on his missionary activities in Kenya; and that he acted in good faith in informing the Plaintiff of his travel arrangements. He has also

pointed out that he is traveling during the low season when rates are subsidized and that it will not be possible for him to get cheap tickets again during the year.

At the hearing of the application learned counsel for the Defendant pointed out that there is a previous similar application that has not yet been prosecuted and which is still pending. There was no word from the Plaintiff's learned counsel in this regard. I have perused the court record. Indeed there is an application by chamber summons dated 30th June, 2003 filed by the Plaintiff on the same date. Prayer No. 3 thereof is for the same order that the Defendant do furnish security for his appearance in the sum of Kshs.5 million, and is stated to be brought under the same Order 38, rule 1 of the Rules. The order had been sought upon the ground that the Defendant was not a Kenyan citizen and that there was real danger that he would abscond the jurisdiction of the court. The court record discloses that this earlier application has not been heard or otherwise disposed of. On that basis the bringing of the present application, which is similar, amounts to an abuse of the process of the court and the application is liable to be struck out.

But I will consider the merits of the application all the same. It was alleged in June, 2003 that the Defendant was intending to flee the jurisdiction of the court. Two years later he was still in the country. He volunteered the information that he would be out of the country between May, 2005 and January, 2006 and suggested that hearing of the case be brought forward from 7th June, 2005 to enable him to attend the hearing before he travels abroad. Instead of taking up the offer the Plaintiff cynically brings the present application alleging that the Defendant was intending to abscond the jurisdiction of the court. I have considered the requirements set out in rules 1 and 2 of the Order 38. I am not satisfied that the Defendant, with intent to delay the Plaintiff, or to avoid any process of the court or to delay or obstruct the execution of any decree that may be passed against him, is about to abscond or leave the local limits of the jurisdiction of the court, or is about to leave Kenya under circumstances affording reasonable probability that the Plaintiff will, or may thereby, be obstructed or delayed in the execution of any decree that may be passed against the Defendant in this suit. If the Defendant had such intent would he have loudly announced his travel arrangements to the Plaintiff as he did in the letter dated 28th February, 2005? I think not. It seems to me that this application is not brought in good faith. The Plaintiff simply wants the Defendant's freedom of movement curtailed to ensure that he attends hearing of the suit on 7th June, 2005. But, obviously, the pendency of a *suit per se* cannot be a sufficient reason to deny a litigant his freedom of movement, including the freedom to travel abroad. That is why rule 1 of Order 38 requires more, much more.

I would in the event refuse the application. It is hereby dismissed with costs. Order accordingly.

DATED AND SIGNED AT NAIROBI THIS 31ST DAY OF MAY, 2005

H.P.G. WAWERU

JUDGE